

## U.S. COMMISSION ON CIVIL RIGHTS

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## MEETING

+ + + + +

Friday, September 16, 2005

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The Commission convened in Room 540 at 624  
Ninth Street, N.W., Washington, D.C. at 9:30 a.m.,  
Gerald A. Reynolds, Chairman, presiding.

PRESENT:

GERALD A. REYNOLDS, CHAIRMAN

ABIGAIL THERNSTROM, Vice CHAIRMAN

JENNIFER C. BRACERAS, Commissioner

PETER N. KIRSANOW, Commissioner

ASHLEY L. TAYLOR, JR., Commissioner

MICHAEL YAKI, Commissioner (via telephone)

KENNETH L. MARCUS, Staff Director

STAFF PRESENT:

TERESA BROOKS

CHRISTOPHER BYRNES

DEBRA CARR, ESQ., Associate Deputy Staff Director

IVY DAVIS, Director ERO/Acting Chief, Regional  
Programs Coordination Unit

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STAFF PRESENT (Continued):

TERRI DICKERSON, Assistant Staff Director

PAMELA A. DUNSTON, Chief, Administrative Services and  
Clearinghouse Division

BARBARA FONTANA

LATRICE FOSHEE

DORELLE GRAY

GEORGE M. HARBISON, Director, Human Resources

Division/Acting Chief, Budget and Finance  
Division

SETH JAFFE

SOCK-FOON MACDOUGALL

TINA LOUISE MARTIN, Director for Management, Office  
of Management

EMMA MONROIG, Solicitor/Parliamentarian

AONGHAS ST. HILAIRE

AUDREY WRIGHT

MIREILLE ZIESENISS

COMMISSIONER ASSISTANTS PRESENT:

CHRISTOPHER JENNINGS

LISA NEUDER

KIMBERLY SCHULD

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P R O C E E D I N G S

(9:33 a.m.)

CHAIRMAN REYNOLDS: Okay. This meeting will come to order.

This is a meeting with most of the Commissioners participating here in Washington. There's an exception. Commissioner Yaki is participating by telephone.

Commissioner Yaki, are you there?

COMMISSIONER YAKI: Yes.

**I. Approval of Agenda**

CHAIRMAN REYNOLDS: Very good. Okay. The first item on the agenda is the approval of the agenda. Section 3 of the agenda should be amended in order to postpone until further notice the briefing on the Patriot Act as it relates to anti-Arab and anti-Muslim intolerance.

May I have a motion?

VICE CHAIRMAN THERNSTROM: So moved.

COMMISSIONER KIRSANOW: Second.

CHAIRMAN REYNOLDS: Discussion.

COMMISSIONER YAKI: I just want to thank the rest of the Commission for allowing this to be postponed so that I could participate in person when I am actually in Washington, D.C. So thank you very

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1 much.

2 CHAIRMAN REYNOLDS: Okay. Let's vote. All  
3 in favor, please indicate by saying aye.

4 (Chorus of ayes.)

5 CHAIRMAN REYNOLDS: Any in opposition?

6 (No response.)

7 CHAIRMAN REYNOLDS: Okay.

8 VICE CHAIRMAN THERNSTROM: I was just  
9 going to say if they were what would happen.

10 CHAIRMAN REYNOLDS: Well, we just want to  
11 have it on the record.

12 Okay. The motion passes unanimously.

13 **II. Approval of Minutes**

14 CHAIRMAN REYNOLDS: Now, the agenda. We  
15 have some additional amendments. There is a motion to  
16 postpone a vote on the state advisory reports so that  
17 the SAC working group can continue its work.

18 VICE CHAIRMAN THERNSTROM: So moved.

19 CHAIRMAN REYNOLDS: Thank you.

20 Second?

21 COMMISSIONER TAYLOR: Second.

22 CHAIRMAN REYNOLDS: Thank you.

23 Discussion?

24 (No response.)

25 CHAIRMAN REYNOLDS: All in favor please

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1 say aye.

2 (Chorus of ayes.)

3 CHAIRMAN REYNOLDS: Any in opposition?

4 (No response.)

5 CHAIRMAN REYNOLDS: Okay. The motion  
6 passes unanimously.

7 Please let the record reflect that  
8 Commissioner Braceras has joined us.

9 The second item is the approval of the  
10 minutes of the July 22nd and August 26th meetings.  
11 May I have a motion?

12 COMMISSIONER TAYLOR: So moved.

13 CHAIRMAN REYNOLDS: May I have a second?

14 COMMISSIONER KIRSANOW: Second.

15 CHAIRMAN REYNOLDS: Any discussion?

16 (No response.)

17 CHAIRMAN REYNOLDS: All in favor, please  
18 say aye.

19 (Chorus of ayes.)

20 CHAIRMAN REYNOLDS: Any in opposition?

21 (No response.)

22 CHAIRMAN REYNOLDS: The motion passes  
23 unanimously.

24

25

### III. Announcements

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1                   Okay.       At this point next up are  
2 announcements. I'd like to take a minute on behalf of  
3 the Commission to acknowledge the victims of Hurricane  
4 Katrina in Louisiana, Mississippi, and Alabama.  
5 Although these people have experienced unbearable  
6 hardships and may continue to do so for some time, we  
7 all can take solace in the amazing outpouring of  
8 support these individuals have received from their  
9 fellow citizens in surrounding states and from all  
10 over the United States.

11                   On behalf of the U.S. Commission on Civil  
12 Rights, I encourage all who are here today, as well as  
13 all people, to contribute to Katrina relief efforts in  
14 any way you see fit.

15                   Finally, on February -- September 2nd, a  
16 special message was sent to SAC members in Alabama,  
17 Louisiana, and Mississippi expressing the Commission's  
18 best wishes on behalf of the Commissioners, Staff  
19 Directors and staff, as well as asking that they  
20 report to the central regional office any allegations  
21 of discrimination in the recovery efforts.

22                   This week is National Historical Black  
23 Colleges and Universities Week. HBCUs have educated  
24 many American leaders and continue to play an  
25 instrumental role in providing educational

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1 opportunities for all people.

2 This Commission is dedicated to insuring  
3 that these valued institutions continue to maximize  
4 their ability to contribute to our intellectual and  
5 cultural progress, and we'll conduct a briefing in the  
6 coming year to investigate the best ways to achieve  
7 this goal.

8 Yesterday marked the beginning of Hispanic  
9 Heritage Month. This is a month which we celebrate  
10 the tremendous contributions of Latinos to our  
11 country. On behalf of the U.S. Commission on Civil  
12 Rights, I call upon all people of the United States to  
13 observe the month with appropriate ceremonies and  
14 activities.

15 Yesterday, September 15th, marked the 42nd  
16 anniversary of the 1963 bombing of the 16th Street  
17 Baptist Church in Birmingham, Alabama by the Klu Klux  
18 Klan. This tragic bombing carried out by cowardly  
19 racists killed four young black girls. Events such as  
20 this one hopefully can teach us to remain ever  
21 vigilant to assure that those who attempt to impose  
22 their will on their fellow Americans by force or  
23 coercion are never allowed to do so.

24 Next up we will discuss some personnel  
25 matters. First I'd like to announce that Jenny Park,

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1 an attorney advisor at the Commission for over five  
2 years, left the Commission earlier this week to accept  
3 a position with the Patent and Trademark Office. On  
4 behalf of the Commission, I want to acknowledge her  
5 excellent contributions to the Commission over these  
6 past years. We all wish her the best in her new  
7 position.

8 Cecilia Towns, who cannot be here today,  
9 began an internship with the Office of Civil Rights  
10 Evaluation earlier this week. Cecilia is a senior at  
11 Howard University majoring in African American  
12 studies. She will be with the Commission through  
13 December 6th.

14 And at this point we'll hear from the  
15 Staff Director.

16 COMMISSIONER KIRSANOW: Mr. Chair.

17 CHAIRMAN REYNOLDS: Yes.

18 COMMISSIONER KIRSANOW: I just wanted to  
19 make one brief note that the Roberts civil rights  
20 record that my assistant had prepared and we  
21 distributed at the last meeting was introduced into  
22 the record of the Roberts confirmation hearing, and I  
23 think that's a good thing. It, I think, fleshes out  
24 the record of Judge Roberts. I think it's good for  
25 the Commission to have weighed in in some fashion

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1 without, you know, an opinion.

2 And, again, I appeared in my personal  
3 capacity yesterday, and we may want to think at some  
4 point about, as part of our clearing house function,  
5 making that report available generally to the public.

6 CHAIRMAN REYNOLDS: Okay. I think that we  
7 should prepare a motion and at our next meeting have  
8 discussions on -- Commissioner Braceras?

9 COMMISSIONER BRACERAS: I haven't received  
10 a copy of it yet.

11 CHAIRMAN REYNOLDS: That's amazing.

12 COMMISSIONER BRACERAS: I've asked several  
13 people several times. Remember I E-mailed you back  
14 that I couldn't open it and could I have a hard copy?  
15 It's okay.

16 And I mentioned it to Chairman Reynolds.

17 CHAIRMAN REYNOLDS: And I asked someone to  
18 do it. Okay, okay.

19 COMMISSIONER BRACERAS: So I have --

20 CHAIRMAN REYNOLDS: Let's do magic.

21 COMMISSIONER BRACERAS: Thank you. I  
22 will do so now.

23 CHAIRMAN REYNOLDS: Vice Chair Thernstrom.

24 VICE CHAIRMAN THERNSTROM: Neither  
25 Commissioner Braceras nor Commissioner Kirsanow

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1 testified yesterday speaking for the Commission. They  
2 went there speaking for themselves, but I want to  
3 commend both of them on the superb job that they did,  
4 and it was nice to see two faces of the Commission  
5 even in an unofficial capacity do as well as both of  
6 them did.

7  
8 COMMISSIONER KIRSANOW: Thank you.

9 CHAIRMAN REYNOLDS: Okay. At this point  
10 we'll hear from the Staff Director.

11 **IV. Staff Director's Report**

12 MR. MARCUS: Thank you, Mr. Chairman,  
13 Madam Vice Chairman, Commissioners.

14 If it please the Commission I'd like to  
15 extend my written Staff Director's report with brief  
16 additional remarks regarding agency reform and  
17 Hurricane Katrina.

18 I'll begin with agency reforms. We  
19 continue to work toward meeting the goal of  
20 implementing all pending GAO recommendations,  
21 resources permitting, by mid-January 2005.  
22 Considerable progress has been made over the course of  
23 the summer.

24 For example, we have recently issued  
25 administrative instructions establishing new controls

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1 for procurement management. These AIs address general  
2 GAO concerns regarding over centralization of  
3 contracting functions within the office of the Staff  
4 Director and the specific recommendation regarding  
5 greater controls over contracting activities.

6 We plan to provide more agency reforms  
7 regarding procurement over the coming months.

8 We've also recently submitted our budget  
9 estimate to OMB based on the figures recently approved  
10 by the Commission. The budget estimate incorporates  
11 new proposed strategic goals that have been  
12 distributed to the Commissioners and on which we are  
13 now seeking stakeholder input.

14 The inclusion of strategic goals reflects  
15 the work that we are doing to revamp the agency's  
16 strategic planning.

17 We currently are preparing both a five-  
18 year strategic plan and a human capital strategic plan  
19 which we plan to have available in proposed final form  
20 in time for the December meeting. This also responds  
21 to a series of GAO recommendations.

22 We have also recently established a formal  
23 policy on telework. Our new telework policy is part  
24 of a general federal program designed to reduce  
25 traffic and improve the environment, improve employee

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1 morale and commitment, improve productivity and  
2 quality of work, help hire and retain employees, and  
3 enable employees to better arrange their use of leave.  
4 It is also required by federal law.

5 Yesterday, we submitted a report to  
6 Congress describing the significant steps that the  
7 agency has undertaken to reform our financial  
8 operational project planning, strategic planning, and  
9 communications processes. In this report we describe  
10 both the significant progress that we have made over  
11 the last nine months, as well as significant reform  
12 activities still underway.

13 This report is required by the House  
14 appropriations bill committee report. A similar  
15 report will be required by the end of this month to  
16 the Senate appropriations committee.

17 I'd also like to say a few words about  
18 Hurricane Katrina. As the Chairman has indicated, our  
19 regional office coordinator at my request sent a  
20 special message to State Advisory Committee members in  
21 Alabama, Louisiana, and Mississippi shortly after  
22 Hurricane Katrina, and then additional messages were  
23 sent to other State Advisory Committees around the  
24 country.

25 These messages expressed best wishes on

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1       behalf of the Commissioners, the Staff Director and  
2       staff of the agency. They also requested that State  
3       Advisory Committee members report to the central  
4       regional office any allegations of discrimination in  
5       the recovery effort. We have received only a few  
6       responses from State Advisory Committee members,  
7       although our regional offices are tracking media  
8       reports.

9               Last week Louisiana and Alabama SAC  
10       members emphasized the following concerns.

11              One, that needed assistance is not getting  
12       to the rural areas; and

13              Two, that there are reports that Southern  
14       Baptist Convention churches are restricting their  
15       efforts to affiliates only.

16              This week our central regional office  
17       received two additional messages from SAC members.  
18       First, one SAC member in Baton Rouge, Louisiana said  
19       the following: "I'm volunteering with the Red Cross  
20       here. We have one parish that is known for being very  
21       segregated, and that is putting it politely. They  
22       have essentially told the Red Cross that they do not  
23       want 'those people' in their parish. They have made  
24       us consolidate our evacuees to one location and  
25       indicated that they did not want any new evacuees once

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1 those were gone."

2 Another SAC member in Jackson, Mississippi  
3 said the following: "The generosity and support for  
4 Katrina victims within Jackson has been amazing.  
5 Fortunately, I am unable to report any racial  
6 problems."

7 Those are the responses that we've gotten  
8 from SAC members. To the extent that we get  
9 additional reports over the coming weeks and months we  
10 will continue to pass them along to the Commission  
11 members. That is my report.

12 CHAIRMAN REYNOLDS: Okay. Could you shed  
13 some additional light on this move in the Senate to  
14 reduce our budget by \$96,000?

15 MR. MARCUS: Yes, Mr. Chairman. The House  
16 of Representatives had recently passed an  
17 appropriations bill which provided funding for this  
18 agency for fiscal year 2006 at a level of \$9.096  
19 million, which is consistent with our 2005 funding and  
20 is also consistent with the amount requested in the  
21 President's budget.

22 Recently the Senate has been debating an  
23 appropriations bill that would provide funding to the  
24 agency of only \$9 million even, which is a \$96,000  
25 reduction from our current budget.

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1 CHAIRMAN REYNOLDS: And it's my  
2 understanding that the folks in the Senate believe  
3 that this is not a reduction in our budget; is that  
4 correct?

5 MR. MARCUS: The language in the committee  
6 report indicated that the \$9 million even would  
7 represent a slight increase of, I believe, \$25,000  
8 over 2005 levels. We're trying to determine why they  
9 believe that it would be an increase when it appears  
10 to be a decrease in the amount of \$96,000, and we'll  
11 be communicating appropriately with congressional  
12 staff.

13 CHAIRMAN REYNOLDS: Okay. Any other  
14 questions or concerns?

15 COMMISSIONER KIRSANOW: Yes. Mr. Staff  
16 Director, a couple of things. One is where are we  
17 right now with respect to getting on line for the  
18 audit or can we implement an audit at this point?

19 MR. MARCUS: We have now issued two  
20 requests for proposals. The first time we issued a  
21 request for proposals there were a number of responses  
22 by outside accounting firms who were interested in  
23 submitting a bid, but in the end none of them did.

24 We then went back to them to ask why they  
25 did not submit a bid. They had various reasons. Some

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1 of them indicated that they simply did not have enough  
2 time. Others indicated that they didn't think they  
3 would have enough resources to do it. At least one  
4 indicated that they did not think that we would be  
5 auditable for the 2005 fiscal year.

6 Based on the fact that some of the  
7 accountants suggested that they might have submitted a  
8 bid if they had had more time to do so, we then issued  
9 a second RFP. The deadline for responding to that RFP  
10 passed approximately a week ago.

11 We received three bids and a few non-bid  
12 responses. We have contacted at least one of the  
13 nonbidders to find out why they hadn't bid, and we  
14 found out that it was not based on a concern that we  
15 were not auditable.

16 So we now have three bids to choose among,  
17 and we are currently in the process of assembling a  
18 technical panel to review them, including making  
19 contacts to persons outside the agency who have  
20 sufficient technical expertise that they could assist  
21 us in choosing among the panelists in determining to  
22 what extent the bids are appropriate and could provide  
23 the services we require.

24 COMMISSIONER KIRSANOW: Mr. Chair, just a  
25 suggestion. You know, for a while we have suspended

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1 the regular meetings of the Budget Committee mainly  
2 because there wasn't a whole lot to report. We may  
3 want to revisit whether or not we should have a couple  
4 of meetings as matters develop so that we don't take  
5 up time here talking about it.

6 CHAIRMAN REYNOLDS: Okay. Did you have  
7 any conversations? My concern is that we have at  
8 least one firm that has concluded that because of our  
9 lack of documentation we cannot be audited. I don't  
10 want to spend money and then at the end of the process  
11 have whichever firm that is selected reach the same  
12 conclusion.

13 I don't know if this is possible, but on  
14 the front end could we ask the three companies that  
15 have submitted bids to render an opinion as to whether  
16 it's possible to audit our books if we were to provide  
17 them with a description of the type of documentation  
18 we have in our possession?

19 Based on that information, they could give  
20 us an indication whether they were confident that at  
21 the end of the process, you know, that they would not  
22 tell us that an audit is not possible.

23 MR. MARCUS: We can certainly review both  
24 with our legal staff and also with our outside  
25 procurement consultant, to the extent that's

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1 permissible within the rules, and if it is, then we  
2 can certainly speak to them about it.

3 It is my understanding that those three  
4 bidders did believe that we were auditable, and at  
5 least one of the non-bidders did explicitly state that  
6 they believed that we are auditable. They're just not  
7 sure the amount of time and resources that would be  
8 required to audit us.

9 We have heard from some outsiders that the  
10 issue in their mind is not so much whether we were  
11 auditable as the amount of time and resources  
12 necessary to complete the job, but we'll be happy to  
13 consult with legal and procurement consultants to  
14 determine whether we can seek additional statements  
15 from the bidders.

16 CHAIRMAN REYNOLDS: Okay. Commissioner  
17 Kirsanow.

18 COMMISSIONER KIRSANOW: Thank you.

19 Mr. Staff Director, I don't know if you  
20 know this. With respect to the Senate appropriations,  
21 do we have any kind of a timetable for when this all  
22 goes to conference?

23 MR. MARCUS: We've not heard a timetable,  
24 but we can certainly make inquiries and pass the  
25 information along to the Commissioners.

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1 COMMISSIONER KIRSANOW: I mean, as we all  
2 know, we spoke with a number of people on the  
3 congressional side several months ago, and it may be a  
4 good idea to revisit that procedure.

5 MR. MARCUS: The matter was still being  
6 debated by the Senate yesterday. They may have passed  
7 it yesterday. If not, I expect it imminently and we  
8 can find out when it will go to conference.

9 CHAIRMAN REYNOLDS: Any other questions,  
10 concerns, comments?

11 (No response.)

12 **V. State Advisory Committee Issues**

13 CHAIRMAN REYNOLDS: Okay. We have some  
14 additional motions. Here I'll read the next motion.  
15 It reads:

16 "I move that the Commission request that  
17 the State Advisory Committees in the regions and  
18 states to be identified by the General Counsel take up  
19 the desegregation status of public school districts  
20 within their jurisdiction as a research project. This  
21 project will support the work of the Office of General  
22 Counsel in producing the 2007 statutory enforcement  
23 report on the same topic.

24 "As of 2001, there were 400 school  
25 districts still under federal supervision with respect

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1 to desegregation. The Commission's statutory  
2 enforcement report on the desegregation status of  
3 elementary and secondary schools would examine the  
4 unitary status of the schools and possibly others to  
5 determine the success or failure of desegregation. It  
6 would be helpful to have State Advisory Committees in  
7 all states affected by court desegregation orders  
8 collect data on the relevant school districts within  
9 their respective jurisdictions."

10 May I have a motion?

11 COMMISSIONER KIRSANOW: So moved.

12 CHAIRMAN REYNOLDS: A second?

13 COMMISSIONER TAYLOR: Second.

14 CHAIRMAN REYNOLDS: Discussion?

15 VICE CHAIRMAN THERNSTROM: Go ahead, Jen.

16 COMMISSIONER BRACERAS: No. You, Madam  
17 Vice Chair.

18 VICE CHAIRMAN THERNSTROM: Give us a  
19 little background on this. Has there been a  
20 conversation with the regional offices, the State  
21 Advisory Committees as to their capacity to do exactly  
22 what?

23 MR. MARCUS: Mr. Chairman, if I may.

24 CHAIRMAN REYNOLDS: Yes.

25 MR. MARCUS: There have been a few

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1 conversations in some regions, but not with all  
2 potentially affected regions. The southern regional  
3 office has already developed a number of ideas about  
4 how this can be done and, in fact, has been  
5 communicating with State Advisory Committees in their  
6 region and has done a considerable amount of work on  
7 some states to look into the current status of  
8 desegregation efforts in their states.

9 Within the central regional office, there  
10 has been some discussion at a preliminary level,  
11 although I don't believe that there has been work  
12 done.

13 There are other regional offices that are  
14 potentially implicated around the country where I  
15 don't believe work has been done.

16 We are now at a point where I expect that  
17 there would be work by some State Advisory Committees,  
18 but this is certainly something where we could profit  
19 from having views of a larger number, and if so, have  
20 nationwide coordination to insure that the data is as  
21 consistent as possible.

22 There are precedents for requests by the  
23 Commission that State Advisory Committees look into  
24 matters. Since under FACA they are independent  
25 entities, they can look at issues that they choose to,

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1 but the Commission has, for instance, after September  
2 11 recommended that State Advisory Committees look  
3 into post 9/11 issues, and State Advisory Committees  
4 have done so.

5 This is already an issue that is being  
6 looked into by some SACs, and the question is whether  
7 it would be helpful to urge that a greater number of  
8 them look into it.

9 Currently, as the Commissioners recall,  
10 there is a project that has been approved for the  
11 Office of General Counsel for 2007 regarding  
12 elementary and secondary desegregation. It will be  
13 the statutory enforcement report for this year.

14 The Office of General Counsel, of course,  
15 is far smaller now than it was a few years ago. It  
16 was only a few years ago that there were more than ten  
17 attorneys in the Office of General Counsel. We  
18 currently have two attorneys. So they are now under a  
19 challenge to be able to do meaningful analyses at the  
20 same time they are doing the legal work of the agency.

21 By having the State Advisory Committees  
22 look at things first and then provide that by way of  
23 support to the Office of General Counsel, we could  
24 satisfy a few different goals. One is we could insure  
25 or at least recommend that State Advisory Committees

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1 are working on issues that have been identified as  
2 national priorities by this Commission when it votes  
3 on these projects.

4 Second, it can be a way of compensating  
5 for a lack of resources both at a regional level and  
6 at the Office of General Counsel by having a greater  
7 degree of cooperation between the Office of General  
8 Counsel, the regional offices, and the State Advisory  
9 Committees.

10 Third, it can enrich both the work of the  
11 State Advisory Committees and the Office of General  
12 Counsel by having an interchange between the two.

13 With respect to the State Advisory  
14 Committees, they have a capacity to bring a great deal  
15 of local information and knowledge to issues that  
16 really are local in nature, and when it comes to these  
17 desegregation agreements, we see a great deal of local  
18 variations even within particular states.

19 At the same time, our regional staff does  
20 not include any attorneys so that by involving the  
21 regional offices with the Office of General Counsel,  
22 we have a natural way to combine the local information  
23 in connection with the State Advisory Committee, the  
24 social scientific expertise that we have at the  
25 regional level, as well as the legal expertise within

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1 the Office of General Counsel.

2 VICE CHAIRMAN THERNSTROM: You know, I  
3 appreciate everything that you're saying, but -- there  
4 is a "but" here -- before I am willing to urge a large  
5 number of SACs to work on this, I'd like to see  
6 something of the work that the SACs that area already  
7 engaged in this issue have done so that I have some  
8 sense of whether I think the questions they're asking  
9 are the right ones, the way they're collecting data is  
10 correct, what we're likely to get at the end of the  
11 day.

12 I wonder if this can't be done in stages  
13 so that we have a little bit more information before  
14 we sign onto a kind of blanket request here.

15 MR. MARCUS: What I would propose is as  
16 follows. I have already asked the Office of General  
17 Counsel to expedite their work in developing the  
18 discovery plan in conceptual phase for the elementary  
19 and secondary projects. Since it's a 2007 project,  
20 they would normally not be doing that for a  
21 considerable length of time, but I would like to get  
22 at a national level a model working with the regional  
23 offices so that we can get Commissioner input at an  
24 early stage that can guide the State Advisory  
25 Committees.

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1           What I'm concerned about is that if we  
2       don't do that and the State Advisory Committees go too  
3       far too quickly, since some of them are already  
4       looking at the issue, we may be deprived of the  
5       opportunity to get SAC input on the issues and  
6       methodologies that the Commissioners choose to have.

7           VICE CHAIRMAN THERNSTROM: Okay, but if we  
8       were to give those SACs that are already working on  
9       the issue input rather than extending the invitation  
10      for everybody to join in the effort, then we would be  
11      developing guidelines for SACs that will subsequently  
12      be looking at the issue.

13           I mean, you know, I would just like to see  
14      up front what's been done so far, again, what the  
15      questions being asked, et cetera, are and so that they  
16      get our input at this stage before we've got an awful  
17      lot of SACs working on the same issue.

18           CHAIRMAN REYNOLDS: Vice Chair Thernstrom,  
19      so you don't think there will be sufficient time to  
20      revise or redirect the efforts after we have prepared  
21      a document that lays out the process and the  
22      questions, the methodology?

23           VICE CHAIRMAN THERNSTROM: It just seems  
24      to me the earlier we deliver messages about how we  
25      would like to see the issue framed, obviously they are

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1 independent, but how we would like to see the issue  
2 framed, the better off we are, and the best way to do  
3 that is to look at the work of SACs who have already  
4 started down this road.

5 CHAIRMAN REYNOLDS: Okay. Any other  
6 comments?

7 (No response.)

8 CHAIRMAN REYNOLDS: All right. So, Ken,  
9 at this point who started work on the project?

10 MR. MARCUS: Work has been started and  
11 considerable work has been done within the Southern  
12 Regional Office.

13 VICE CHAIRMAN THERNSTROM: Good. Can we  
14 look at that? Is there anything to look at?

15 MR. MARCUS: I can certainly provide a  
16 description of the methodology that they're following,  
17 certainly.

18 CHAIRMAN REYNOLDS: Have they collected  
19 any data at this point?

20 MR. MARCUS: Yes.

21 CHAIRMAN REYNOLDS: Okay. All right. So  
22 if I understand, Vice Chair Thernstrom, the concerns  
23 that you've just expressed, that what you would like  
24 to do is to table this issue until we've had an  
25 opportunity to review the work or at least some of the

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1 work that has been done.

2 VICE CHAIRMAN THERNSTROM: That's correct.

3 I would like to table the motion as currently  
4 written, yes, until we've had an opportunity to get  
5 our arms around what's been done.

6 CHAIRMAN REYNOLDS: Okay. This would not  
7 affect our timetable; is that correct?

8 MR. MARCUS: If we postpone it, then the  
9 soonest we could vote on this is a month from now, and  
10 the only issue is whether in the intervening months  
11 there are State Advisory Committees that would vote to  
12 undertake different projects for the incoming year and  
13 so they wouldn't be looking at that. That's the only  
14 clarification.

15 CHAIRMAN REYNOLDS: Okay. We have what I  
16 will treat as a motion to table.

17 VICE CHAIRMAN THERNSTROM: Yes. Let me  
18 just ask a question about that. Is there some way of  
19 communicating to the SACs that we will be in a month  
20 taking up this issue and they might keep in mind that  
21 we have a particular interest, but we have not yet  
22 voted on the matter?

23 MR. MARCUS: I suppose we could, although  
24 at this point I think that we wouldn't be asking them  
25 to look at elementary and secondary. All that I could

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1 tell them at this point without further guidance is  
2 that the Commissioners are considering whether or not  
3 to make a recommendation that --

4 VICE CHAIRMAN THERNSTROM: Okay. Well,  
5 that's fine. At least it alerts them that this is an  
6 issue of potential interest to us.

7 MR. MARCUS: We could certainly pass that  
8 along.

9 CHAIRMAN REYNOLDS: Okay. Is there a  
10 second?

11 COMMISSIONER BRACERAS: Second.

12 CHAIRMAN REYNOLDS: Additional discussion?

13 COMMISSIONER YAKI: I have a question.  
14 Did we have (unintelligible) Voting Rights Act?

15 CHAIRMAN REYNOLDS: I'm sorry,  
16 Commissioner Yaki. I didn't understand you.

17 VICE CHAIRMAN THERNSTROM: It's not  
18 because you ---

19 COMMISSIONER YAKI: Am I incomprehensible  
20 or you --

21 VICE CHAIRMAN THERNSTROM: No, no, no.

22 CHAIRMAN REYNOLDS: Okay. That's much  
23 better.

24 VICE CHAIRMAN THERNSTROM: It's purely an  
25 electronic problem.

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1 COMMISSIONER YAKI: I've heard that excuse  
2 before.

3 Just asking did we ever ask the SACs to do  
4 anything similar with regard to the Voting Rights Act.

5 CHAIRMAN REYNOLDS: Does anyone recall?

6 MR. MARCUS: I don't believe so. We had  
7 not done this very frequently in the past, although  
8 this is a model that, if successful, I think we should  
9 consider doing for projects in the future.

10 COMMISSIONER YAKI: Well, obviously the  
11 VRA is the big project for next year and probably the  
12 member states that would be looking at this would be  
13 limited by (unintelligible) to consider that as well.

14 I would, for the purposes of comity -- c-o-m-i-t-y,  
15 not comedy -- acquiesce with Commissioner Thernstrom's  
16 request for, I guess, a stay of this forum. I will in  
17 the end be supporting the Staff Director  
18 recommendation.

19 CHAIRMAN REYNOLDS: Additional comments?

20 (No response.)

21 CHAIRMAN REYNOLDS: Okay. All in support  
22 of Vice Chair Thernstrom's motion please say aye.

23 (Chorus of ayes.)

24 CHAIRMAN REYNOLDS: Any in opposition?

25 (No response.)

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1 CHAIRMAN REYNOLDS: Okay. The motion  
2 passes unanimously.

3 Next up. Here's the motion.

4 "I move that the Commission approve the  
5 report produced by the Office of the Staff Director on  
6 the briefing the Commission held on July 15th, 2005,  
7 on the stagnation of the black middle class. The  
8 report as distributed in draft form to Commissioners  
9 includes an executive summary of the panelists'  
10 testimony, their written statements and statements  
11 from the Chairman" -- that's me -- "and Commissioner  
12 Yaki."

13 May I have a motion?

14 VICE CHAIRMAN THERNSTROM: So moved.

15 CHAIRMAN REYNOLDS: A second?

16 COMMISSIONER BRACERAS: Second.

17 CHAIRMAN REYNOLDS: Discussion?

18 (No response.)

19 CHAIRMAN REYNOLDS: All in favor please  
20 indicate by saying aye.

21 (Chorus of ayes.)

22 CHAIRMAN REYNOLDS: Any in opposition?

23 (No response.)

24 CHAIRMAN REYNOLDS: The motion passes  
25 unanimously.

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1 Okay. Let's see what we have left.

2 Okay. I believe this is the last motion.

3 "In Adarand v. Pena, the Supreme Court  
4 quoting Richmond v. Croson stated that 'absent  
5 searching judicial inquiry into the justification for  
6 such race based measures, there is simply no way of  
7 determining what classifications are benign or  
8 remedial and what classifications are, in fact,  
9 motivated by illegitimate notions of racial  
10 inferiority or simple racial politics.' The Court  
11 went on to hold that federal programs that use racial  
12 classification are subject to strict judicial  
13 scrutiny.

14 "While the Court has not provided clear  
15 guidance on the contours of the strict scrutiny  
16 standard, it is clear that any state or federal agency  
17 that uses racial preferences must provide a strong  
18 basis in evidence for the conclusion that the use of  
19 racial preferences is necessary.

20 "In an attempt to comply with this  
21 constitutional requirement, federal and state agencies  
22 and contractors have commissioned disparity studies to  
23 demonstrate discrimination with the statistical  
24 analysis showing under representation of minorities or  
25 women among federal contractors. The briefing would

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1 feature academic experts, and the subject matter, who  
2 can provide a wide range of viewpoints about the  
3 methodological and empirical strength and quality of  
4 disparity studies conducted since 1995 and the  
5 relationship of these studies to federal agencies'  
6 procurement activities."

7 May I have a motion in support?

8 VICE CHAIRMAN THERNSTROM: So moved, but  
9 because I don't know my Robert's Rules the way I  
10 should --

11 CHAIRMAN REYNOLDS: We're pretty informal  
12 around here.

13 VICE CHAIRMAN THERNSTROM: -- it seems to  
14 me the sentence "in an attempt to comply" should  
15 include or it should read "federal and state agencies,  
16 municipalities, and contractors." A lot of these  
17 disparity studies have been commissioned by  
18 municipalities.

19 CHAIRMAN REYNOLDS: Okay. I will take  
20 that as an amendment. Is there a second to the  
21 amended motion?

22 COMMISSIONER BRACERAS: Second.

23 CHAIRMAN REYNOLDS: Thank you.

24 Discussion?

25 COMMISSIONER YAKI: Discussion. What

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1 would be the timing?

2 CHAIRMAN REYNOLDS: Staff Director Marcus?

3 MR. MARCUS: I would recommend December  
4 for it, the advantage being that it would be in the  
5 same calendar year as two important studies. First,  
6 the Adarand report that we're doing, and second, a  
7 report by the National Academy of Science dealing with  
8 disparity studies, and I would think that it would be  
9 useful to have this briefing close in time and  
10 preferably in the same calendar year as those two, as  
11 the reports come out.

12 COMMISSIONER YAKI: Okay. Thank you.

13 CHAIRMAN REYNOLDS: Vice Chair Thernstrom.

14 VICE CHAIRMAN THERNSTROM: I'm just  
15 looking at this same sentence again. I don't think  
16 contractors themselves, but I could be wrong, have  
17 commissioned disparity studies. It's really federal  
18 and state agencies as well as municipalities. I don't  
19 believe contractors are commissioning these, but I  
20 could be wrong again. Other people here probably know  
21 better.

22 CHAIRMAN REYNOLDS: Well, I don't know.  
23 Out of an abundance of caution, how about if we just  
24 leave that in. I don't think anything would turn on  
25 it if we turn out to be wrong or if you turn out to be

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1 right, I should say.

2 Commissioner Taylor.

3 COMMISSIONER TAYLOR: I just have a  
4 question as to the direction. It seems rather narrow,  
5 and I just want to make sure. Is that intentional?  
6 We're going to focus on really the debate as to the  
7 quality of the study. Is that what we're really  
8 focusing on here rather than this third bullet point,  
9 which to me personally is probably more important  
10 relative to Adarand in the sense that even if you have  
11 a study that is properly done and you demonstrate the  
12 disparities, I mean, that's just the first question.

13 So are we intentionally being this narrow  
14 or maybe it's just me that thinks it. I'm more  
15 concerned about the second question than I am, quite  
16 frankly, about the first.

17 CHAIRMAN REYNOLDS: Okay. Let me catch up  
18 with you. I'm trying to find that bullet point that  
19 you're referring to.

20 COMMISSIONER BRACERAS: Yeah, me, too.

21 VICE CHAIRMAN THERNSTROM: What bullet  
22 point? What are you looking at?

23 COMMISSIONER TAYLOR: The scope.

24 CHAIRMAN REYNOLDS: Are you in Section 7?

25 COMMISSIONER TAYLOR: No. I'm sorry.

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1 Mine is maybe numbered a little differently than you  
2 all.

3 VICE CHAIRMAN THERNSTROM: I don't have  
4 any numbers at all. That's the problem.

5 COMMISSIONER TAYLOR: Lisa is going to  
6 help here.

7 CHAIRMAN REYNOLDS: Okay. Does everyone  
8 have the document?

9 COMMISSIONER BRACERAS: I don't have the  
10 document.

11 CHAIRMAN REYNOLDS: Okay. Would you mind  
12 reading the particular bullet that you're concerned  
13 about?

14 COMMISSIONER TAYLOR: This relates to the  
15 scope of the study, and the third bullet point reads,  
16 "The relationship of these studies to federal  
17 agencies' procurement activities," which is something  
18 I agree with.

19 CHAIRMAN REYNOLDS: Okay, and your  
20 concern?

21 COMMISSIONER BRACERAS: I'm sorry. Just  
22 to clarify, is this the document that was prepared  
23 just for your personal use?

24 CHAIRMAN REYNOLDS: No, it's in the  
25 briefing book.

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1 VICE CHAIRMAN THERNSTROM: It is in the  
2 briefing book.

3 COMMISSIONER BRACERAS: I don't have that.

4 VICE CHAIRMAN THERNSTROM: It's at the  
5 very end, Jennifer, very end. In fact, it's the last  
6 page.

7 COMMISSIONER BRACERAS: I didn't receive  
8 it.

9 CHAIRMAN REYNOLDS: Did you look in  
10 Section 8?

11 COMMISSIONER BRACERAS: I don't think I  
12 have that section for some reason.

13 Okay. That's fine. I think for some  
14 reason we either didn't receive that one or just  
15 missed it. Okay. Thank you very much.

16 MR. MARCUS: Let me say that there was not  
17 intended to be a discrepancy between the concept paper  
18 and motion. The idea is that the briefing will look  
19 primarily at the methodologies used in the disparities  
20 studies, but that the briefing may be broad enough to  
21 include not just the narrow methodological question,  
22 but also as the bullet point points out, the  
23 relationship of these studies to federal agencies'  
24 procurement.

25 CHAIRMAN REYNOLDS: Yes, but that was a

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1 part of the motion also.

2 COMMISSIONER TAYLOR: It was. I just  
3 wanted to get a sense of the body as to what folks  
4 were most interested in and as we identified potential  
5 panelists and speakers.

6 CHAIRMAN REYNOLDS: Okay.

7 COMMISSIONER TAYLOR: It was more of a  
8 question than anything else.

9 CHAIRMAN REYNOLDS: Well, you have kicked  
10 up all of this dust here.

11 COMMISSIONER TAYLOR: Yeah, it was just a  
12 general question. I mean, I'm just personally -- and  
13 even if we agree that the study, again, has been  
14 properly done and demonstrates disparities, I mean, I  
15 just tend to be more focused on the next question.

16 CHAIRMAN REYNOLDS: Okay, and please  
17 articulate that.

18 COMMISSIONER TAYLOR: From my perspective  
19 at least the next question is rather simple, and  
20 again, this is how I frame the issue. I tend not to  
21 be as focused on whether or not there are disparities  
22 since I can agree that there's a disparity and then  
23 start to focus on the important policy issue, that is,  
24 whether or not, again, as we addressed in our Adarand  
25 report, whether or not we ask the agencies to do the

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1 hard work of identifying the hurdles in place that are  
2 creating the disparities.

3 And then the second question is whether or  
4 not they're really focusing whether in a race neutral  
5 way or race conscious way on addressing those issues.

6 As it was read, at least, this sounded  
7 narrowly crafted to address methodology, which is  
8 important because we've also had discussions about  
9 disparity generally, and if it's intended to touch  
10 upon that for those studies, then I wanted to know  
11 that versus that broader question.

12 CHAIRMAN REYNOLDS: Okay. I'm just going  
13 to jump in here quickly. At least my view of this  
14 proposal, it's first to assess the factual predicate  
15 for using racial preferences, and also I hope that  
16 this proposal would also look into whether -- well,  
17 you may have a statistical disparity that has nothing  
18 to do with discriminatory conduct, and for example, do  
19 they disaggregate those types of statistical -- well,  
20 that type of under representation versus under  
21 representation that could be traced back to  
22 discriminatory conduct.

23 So that's what I was thinking, and the  
24 rest of the Commission will speak for themselves.

25 Vice Chair Thernstrom?

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1 VICE CHAIRMAN THERNSTROM: Yeah.  
2 Commissioner Taylor, it seems to me we're not simply  
3 examining methodology here. I think we're also  
4 looking at the underlying assumptions, and this is  
5 really piggybacking on what the Chair just said.

6 And on the same page that you're looking  
7 at, one of the sentences says here the critiques point  
8 to a number of questions are listed, but the last one  
9 is the lack of a theory of discrimination underlying  
10 the study.

11 And I would hope that as we look at this  
12 issue we would talk precisely about that, that is,  
13 precisely about the relationship between disparities  
14 and discrimination.

15 COMMISSIONER TAYLOR: Okay, okay.

16 VICE CHAIRMAN THERNSTROM: And how do you  
17 know when there's a close connection and where the  
18 questions lie when the connection seems more tenuous.

19 CHAIRMAN REYNOLDS: Commissioner Taylor,  
20 thank you for kicking up the dust. It has helped  
21 clarify the issue.

22 COMMISSIONER TAYLOR: I just wondered what  
23 our other folks were reading. That's all.

24 MR. MARCUS: Mr. Chairman, if I may, I  
25 think there is one point where it would be useful to

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1 have some clarity. While the issues that Vice  
2 Chairman Thernstrom indicated are part of this scope,  
3 as it was written the scope does not include and was  
4 not intended to include the question as to whether  
5 agencies assure us they're assuring race neutral  
6 alternatives.

7 That, of course, is the main subject of  
8 the report, but it is not intended to be part of the  
9 briefing. I suppose it could be but that was not part  
10 of the scope. If Commissioners wanted a change, then  
11 we could make the change.

12 VICE CHAIRMAN THERNSTROM: No, no. I did  
13 not mean to indicate that that become part of the  
14 scope, but simply that we flesh out the underlying  
15 assumptions.

16 COMMISSIONER TAYLOR: I know our language  
17 has become rather loose. We now equate disparity with  
18 discrimination, and we're --

19 VICE CHAIRMAN THERNSTROM: Right, right.

20 COMMISSIONER TAYLOR: -- the issue.

21 VICE CHAIRMAN THERNSTROM: Exactly. This  
22 report should raise questions about the legitimacy of  
23 doing so, and if legitimate, in what context?

24 CHAIRMAN REYNOLDS: Okay. Any other  
25 questions or comments?

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1 (No response.)

2 CHAIRMAN REYNOLDS: Okay. At this point  
3 we'll vote. All in favor please indicate by saying  
4 aye.

5 (Chorus of ayes.)

6 CHAIRMAN REYNOLDS: All in opposition?

7 (No response.)

8 COMMISSIONER YAKI: I'll abstain.

9 CHAIRMAN REYNOLDS: Okay. Please let the  
10 record reflect that Commissioner Yaki abstained. The  
11 motion passes.

12 All right. Well, we're at a close. Oh,  
13 I'm sorry. Commissioner Braceras.

14 COMMISSIONER BRACERAS: Just before we  
15 adjourn I wanted to ask about the status of the  
16 Patriot Act briefing, if that was going to go forward  
17 in November. What is the briefing schedule generally  
18 for the next several months?

19 MR. MARCUS: October we are planning a  
20 briefing on the Voting Rights Act.

21 COMMISSIONER BRACERAS: Okay.

22 MR. MARCUS: November we're trying to put  
23 together the campus anti-Semitism briefing. December  
24 I would anticipate being the disparity studies issues.

25 COMMISSIONER BRACERAS: So what did we

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1 decide to do with the Patriot Act?

2 CHAIRMAN REYNOLDS: We haven't decided yet  
3 on a date. First we're going to have to circle around  
4 and see if we can get the witnesses who we initially  
5 secured. We have to check with their schedules, and  
6 if everything goes according to plan, they'll be able  
7 to participate. If not, we'll have to seek other  
8 witnesses of the same caliber.

9 COMMISSIONER BRACERAS: Well, but we can't  
10 see if they're available unless we have a date.

11 VICE CHAIRMAN THERNSTROM: Or some  
12 alternative dates.

13 COMMISSIONER BRACERAS: Okay.  
14 Commissioner Yaki, do you still want to go forward  
15 with the Patriot Act briefing?

16 COMMISSIONER YAKI: Yes, I do.

17 COMMISSIONER BRACERAS: And what is your  
18 sense of when it would be a good time to hold it?

19 COMMISSIONER YAKI: Ideally as soon as  
20 possible, but I would hope as was suggested we give a  
21 range of a couple of dates and see which ones best fit  
22 the best panel that we can put together. I'll leave  
23 that up to the Staff Director's discretion.

24 CHAIRMAN REYNOLDS: Do we have anything  
25 planned for January? Do we have any briefings

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1 scheduled?

2 MR. MARCUS: The Commissioners voted to do  
3 a briefing on the question of discrimination or racial  
4 preferences at law schools, the subject of the  
5 Professor Richard Sanders' article in either January  
6 or February or March, and we've been talking with him  
7 about availability, but we haven't specifically fixed  
8 something for January.

9 CHAIRMAN REYNOLDS: Okay. Is there a --  
10 Vice Chair Thernstrom.

11 **VI. Future Scheduling**

12 VICE CHAIRMAN THERNSTROM: I have one  
13 other matter to bring up before we adjourn. The  
14 practice of this Commission is to set the dates of  
15 Commission meetings the following year very late in  
16 the calendar year, that is, to set the meeting dates  
17 for '06 very late in '05.

18 I find this very difficult since, you  
19 know, I've got a calendar that's filling up. Can we  
20 by the next Commission meeting put together a schedule  
21 of meeting dates and in the future I hope do it  
22 earlier?

23 CHAIRMAN REYNOLDS: There's no reason --  
24 correct me if I'm wrong -- there isn't any reason that  
25 we wouldn't be able to do it by the next meeting.

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1 MR. MARCUS: We certainly can, and in  
2 fact, staff were planning to propose some dates during  
3 the October meeting.

4 VICE CHAIRMAN THERNSTROM: Thanks. I  
5 think that's because I already asked before, but we  
6 usually do it very late, and that's fine. Good.

7 CHAIRMAN REYNOLDS: Okay. So,  
8 Commissioner Braceras, would you be comfortable if Ken  
9 were to work on selecting a date so that at our next  
10 meeting he could inform us where we stand with respect  
11 to the briefing relating to the Patriot Act?

12 COMMISSIONER BRACERAS: Oh, yes. I was  
13 just curious as to what had happened because I knew  
14 that we needed to cancel it, and I had just never  
15 heard anything further. So that's why I just wanted  
16 the status update.

17 MR. MARCUS: Okay. So I can go ahead, and  
18 I want to make sure that it's clear, and see whether  
19 the panelist or people that are equivalent expertise  
20 are available for January or February of 2006.

21 CHAIRMAN REYNOLDS: Yes.

22 VICE CHAIRMAN THERNSTROM: And I would  
23 like to note that we had put together an excellent  
24 panel, and the quality of that panel is our standard.

25 CHAIRMAN REYNOLDS: Okay. All right. We

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1 are adjourned.

2 (Whereupon, at 10:23 a.m., the Commission  
3 meeting was concluded.)  
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5  
6  
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10  
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